IN THE

# Supreme Court of the United States

October Term, 1979

Misc. Docket No. 79-875

Shui Ping Wu and Bing Fa Yuen, *Petitioners*

*v.*

State of Maryland, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BARRY H. HELFAND

Attorney for Petitioners
23 West Middle Lane
Rockville, Maryland 20850
(301) 424-0115

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Petitioners WU and YUEN pray that a Writ of Certiorari issue to review the judgment of the Maryland Court of Appeals, affirming the judgment of conviction reviewed by the Court of Special Appeals of Maryland and entered by the Circuit Court of Montgomery County, Maryland.

## OPINIONS BELOW

The Opinion of the Court of Special Appeals of Maryland is reported at 43 Md. App. 109, and is appended. No Opinion was filed by the Maryland Court of Appeals.

## JURISDICTION

The judgment of the Maryland Court of Appeals was entered on September 10, 1979, which denied review of the

decision of the Court of Special Appeals of Maryland. This petition is filed within ninety (90) days of the judgment as required by Rule 22(1) of the Rules of this Court.

The jurisdiction of this Court is invoked under 28 USC 1257.

## QUESTIONS PRESENTED

1. When a Trial Judge arbitrarily and capriciously denies counsel the opportunity to argue to the jury selective sections from the official transcript prepared by the official court reporter in his closing argument, preventing counsel from collating, sifting and treating the evidence in his own way, have the Defendants been denied due process and the effective assistance of counsel?

2. Is it a violation of the Defendants' right to due process of law when a Trial Judge refuses to inspect the prosecution's file, including police reports and investigative information after making an *Affirmative Promise* on the record to inspect such information if the trial resulted in a conviction?

3. Where a Defendant is totally denied access to a witness of an alleged crime due to the fact that the State had isolated the witness from the Defendant, placed the witness in a Federal Witness Protection program, kept the location of the witness a complete secret from the Defendant until the day of trial, when the witness refused to talk to defense counsel, is it a violation of due process of law for the trial Court to refuse to give a "missing witness instruction" when properly requested after the State fails to call the witness to testify and that said witness was an eyewitness to the alleged crime?

## STATEMENT OF FACTS

The Petitioners were tried and each convicted of the crime of extortion and sentenced to a term of five (5) years. Counsel had ordered daily copy of the transcript. The State also had ordered copies of the transcript. Just prior to arguing to the jury, the State represented by *Irma Raker, Esquire*, asked to



address the Court and at a bench conference, the following colloguy was entered upon the record:

### AFTERNOON SESSION

(2:05 p.m.)

*The Court:* Bring in the jury.

*Ms. Raker:* May I address the Court?

*The Court:* Certainly.

*Ms. Raker:* I have one last question with respect to argument before the jury.

We all know the jury's recollection controls and that they are the judges solely of the law and the facts. I would indicate to the Court that both Mr. Helfand and I have during the course of the trial ordered testimony of certain of the witnesses. It is my understanding that it is inappropriate to read from a transcript indicating that that is the official record, or that—

*The Court:* Yes, I do not permit that.

*Mr. Helfand:* Even with a comment that it is their recollection, but we have had it typed and it is—

*The Court:* I'm not going to permit you to read the transcript of the proceedings. You can take exception to that if you wish.

*Mr. Helfand:* I would like to now and not have to do it later.

*The Court:* All right.

(Whereupon, jury enters the courtroom.)

The Defendants were charged with making verbal threats against two specific persons, Raymond Lee and Stella Kwong.

Each of these alleged victims were under the protection of the Federal Witness Protection Act and refused to talk to defense counsel prior to trial. Counsel advised the Court that he wished to lay the foundation for a "missing witness" instruction. The State on the record admitted that the witnesses refused to talk to defense counsel.

During the trial, one, *Hang Sang Leong,* was called to the stand. After direct but before cross-examination, defense counsel asked the Court to compel the State to produce any statement made by this witness so that counsel could cross-examine and determine if there was any exculpatory information or if there was any inconsistency of statements. Counsel again pointed out that later in the trial, he believed the State was going to call Stella Kwong and further that counsel wished to see their respective statements.

To this, the court replied on the record:

> *The Court:* Well, it is up to you. As I said before, I am not going to get into a position of ordering the State to produce statements. But if the trial results in a conviction I will examine those statements in camera. If there are inconsistent statements in them I will declare a mistrial.

Certain copies and a certain Detective's notes were suggested. Again on the record, the Court indicated that if the State had anything favorable under *Brady v. Md.*, the State would be obligated to turn it over. To this, the prosecutor stated, she "will review the statement and if there was anything inconsistent, I will make it known". Then counsel was compelled to cross-examine without the benefit of having seen the written statements. After cross-examination, the State conducted a redirect examination of its witness. In the course of the redirect, the State claimed surprise. After re-cross, the trial ended for the day to resume on September 28, 1978. On the next day, the State's Attorney handed to counsel a copy of Lee's statement.

Stella Kwong's statement (the missing eyewitness) has never been produced for counsel or for the Court.



That after the trial on September 29, 1978, counsel asked the State in a letter for an investigation of the files and notes and also filed a motion for *in camera* inspection of the State's file, notes and detective notes. The *in camera* motion was filed on October 10, 1978. Surprisingly, the Court denied the motion and therefore no one has ever been able to determine if there exists *Brady* information or an abuse of any prosecutorial duty.

## REASONS FOR GRANTING THE WRIT

### I. The Defendants were denied due process of law and the effective assistance of counsel when the Trial Judge arbitrarily refused to allow counsel to argue to the jury using the actual court transcript.

The Maryland Court of Special Appeals indicated that this question gave them considerable concern. They indicated "the third issue (this issue) gives us considerably more procedural concern".

Courts have always been jealously concerned with safeguarding the broad rights of arguments of counsel. *Wilhelm v. State*, 272 Md. 404. It is well established that unreasonable restrictions on defense counsel's rights to argue is a violation of the Defendant's Sixth Amendment Right to effective assistance of counsel as well as violations of the Fifth and Fourteenth Amendment Rights to due process of law.

The current Maryland law which applies to the issue is that such reading is within the "sound discretion" of the trial judge. The rationale behind making such a determination discretionary is based upon the unique position of the trial judge to consider the totality of the facts at trial.

The Court of Special Appeals in this case stated: "[t]hat discretion, however, must not be exercised arbitrarily so as to automatically preclude even a consideration of reading excerpts from the transcript".

The record of this case states that:

"*Ms. Raker:* [prosecuting attorney]: I have one last question with respect to argument before the jury.

We all know the jury's recollection controls and that they are the judges solely of the law and the facts. I would indicate to the Court that both Mr. Helfand and I have during the course of the trial ordered testimony of certain of the witnesses. **It is my understanding that it is inappropriate to read from a transcript** indicating that that is the official record, or that—

*The Court:* **Yes, I do not permit that.**

*Mr. Helfand:* Even with a comment that it is their recollection, but we have had it typed and it is—

*The Court:* I'm not going to permit you to read the transcript of the proceedings. You can take exception to that if you wish.

*Mr. Helfand:* I would like to now and not have to do it later.

*The Court:* All right.

(Whereupon, jury enters the courtroom.)"

(emphasis added)

It is patently clear from his response to the prosecutor's statement that the trial judge had a *misconception* of the status of the law with regard to this issue and made a *non-discretionary decision*, automatically excluding the reading from the transcript without considering all of the facts which is the foundation of the rationale of discretion.

Addressing the issue of the proffer, the above extract demonstrates that the defense counsel was interrupted in his attempt to argue and proffer following the Court's decision by the trial judge.



To suggest that when a trial judge says "I'm not going to permit you to read the transcript of the proceedings, you can take exceptions to that if you wish", an attorney should respond by continuing with his proffer, is to suggest that an attorney should be disrespectful towards the Bench and its decision, something that this counsel has been trained and conditioned not to be. Once a judge says "no", take an exception, it is essential for the orderly administration of justice that the taking of an exception be enough to preserve counsel's right for his appeal. When the trial judge says as was said in this case, "I'm not going to permit you to read the transcript of the proceedings, you can take an exception to that if you wish", the Court has clearly indicated that an exception is all that is needed to preserve the error for appellate review. The die has been cast and both the Court and counsel must live by the ruling. The Court of Special Appeals called the decision of the lower Court "stilted". It is clear that it was *arbitrary* since just before the trial judge ruled the prosecutor said: ". . . it is my understanding that it is inappropriate to read *from* a transcript indicating that it is the official record, or that . . ."

*The Court:* Yes, I do not permit that.

First, the Court cut off the prosecutor indicating no further need to listen and then *clearly* that he does not permit it meaning he does not permit it *ever*. This is arbitrary.

Briefly addressing the issue whether the lack of the context makes the error, if any, "obviously harmless"; first, the transcript for his closing argument. If such a denial was wrongful, that, in and of itself is reversible error on the basis that the Defendants' counsel could not do what the constitution provided he be entitled to do.

Counsel was arbitrarily denied the right to present closing argument with the content he was constitutionally allowed to utilize. Regardless what was argued, *argument* did not contain readings from the transcript and arbitrarily refusing to allow counsel to utilize the transcript to present the evidence "from the point of view most favorable to [the defendant]" is a violation of the Defendants' Sixth Amendment Right and reversible error.

Additionally, counsel has just been advised by the trial court reporter that the closing argument was recorded and could be transcribed. The said material was not forwarded to counsel when he ordered the "entire record" because it is the policy not to include argument unless "specifically requested". If the Court is of the opinion that such material is necessary to decide this issue, the material will be included in the brief.

The Supreme Court of the United States held in *Herring v. New York*, 422 U.S 853, a case where closing argument was not allowed, that closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial.

In *Herring, supra.*, the Court, obviously did not have a record of the disallowed argument and stated "there is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. The credibility assessment was solely for the trier of fact. But before that determination was made, the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him."

Following that rationale of *Herring*, what "was" argued is not relevant to this issue; what *is* relevant to the issue is what counsel was erroneously "*not*" allowed to argue.

This question as presented to the Court for determination is of significant public importance since as the case now stands, the Court of Special Appeals has established a new criteria for judicial discretion which undermines the rationale of its intended function.

**II. The Trial Judge who stated he would examine the State's file plus police reports must do as he promised as counsel and Defendants have relied upon such a promise.**

The issue raised is "not" whether a judge is under an affirmative duty to always inspect such documents, but rather whether after a trial judge makes an *affirmative representation*



on the record to inspect certain documents, that he has an affirmative duty to do so.

The distinction between the above issues is obvious. When a trial judge makes a representation to counsel, counsel has a right to allow the representation and present his case accordingly.

Defense counsel throughout all phases of this action made every effort possible and proper to obtain the relevant statements of three prime State witnesses (Leong, Lee and Kwong), asserting that failure to surrender such information was a violation of the Defendants' Sixth Amendment Right to effective assistance of counsel, due process of law, and the discovery provisions of *Brady vs. Md.*, 373 U.S. 83 and Md. Rule 741 (a)1.

In this case, the trial judge stated that "if the trial results in a conviction, I will examine those statements *in camera*. If there are inconsistent statements in them, I will declare a mistrial".

Based solely upon that statement, and reliance thereon, defense counsel felt that the Defendants' rights with regards to those statements were protected. Defense counsel's primary concern throughout the attempts to obtain the said statements had been to make certain that an *independent, unbiased* party would have an opportunity to review the material to make certain that there was no exculpatory information therein contained. Counsel had been very concerned that the only basis of information that there was no exculpatory material, coming from a source that was vigorously prosecuting the Defendants.

The importance of the promised inspections is further compounded by the fact that: (1) The State by numerous affirmative representations to both defense counsel and the Court unexpectedly reversed its stated intention and failed to call Stella Kwong as a witness and (2) despite continued demands by the defense counsel for the abovementioned statements through every phase of the action and refused by the prosecution, the record reflects that the *prosecutor herself was uncertain as to the contents of the said material.* When the Court made the

above quoted representation to inspect, the prosecutor responded with "I do not have a copy of the statement. I would like an opportunity to ready the police officer's statements and make sure."

The leading case on *Modern Prosecutorial Duties* is *Brady v.s Md.*, 373 U.S. 83. The *Brady* formulation of prosecutorial duty contains at least five important factors which must be considered. They are:

(1) Necessity of a request,
(2) The timing of disclosure,
(3) Who decides what is favorable,
(4) What constitutes suppression, and
(5) Materiality of guilt or punishment.

The defense requested disclosure in its pre-trial motions and at trial. Here, the trial Court indicated it would review the material and counsel relied upon such a statement.

Under *Brady*, there is a constitutional violation only if the prosecutor suppresses or withholds evidence requested by the Defendant that is favorable to the Defendant and material to the guilt or punishment. *Younie v. State*, 18 Md. App. 439 311 Atl. 2d 798, reversed on other grounds, 272 Md. 233, 322 Atl. 2d 211.

If evidence highly probative of innocence is in his file, the prosecutor should be presumed to recognize its significance even if he has actually overlooked it. *Giglio vs. U.S.*, 405 U.S. 150 31 *Lawyer Editions* 2d 104. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. It follows that if the ommited evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been commited. *U.S. vs. Agurs*, 49 *Lawyers Edition* 2d 342.

It is abundantly clear that defense counsel throughout all aspects of the trial attempted to establish a safe manner to protect the Defendants' interest in having the said reports material made known to either himself or an impartial third person.



It was based entirely on the Judge's representation that he would in fact review such material if a conviction did in fact result that the defense counsel protected his interests.

If the duty is not incumbent upon a Judge to review such information and material in a normal action, it becomes incumbent upon him when he makes an affirmative representation on the record that he will do so. Such a failure constitutes a violation of the Defendants' rights to due process of law and effective assistance of counsel.

### III. The Trial Court erred by failing to give the requested "missing witness" instruction on the basis that the absent witness was "equally available" to both sides.

The law with regard to the missing witness rule in the State of Maryland has been clearly set forth in the case of *Christensen vs. State*, 274 Md. 133 (1975):

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

*Graves vs. United States*, 150 U.S. 118, 121. *Christensen vs. State*, 21 Md. App. at 430.

It is a matter of significant public interest and importance for this Court to give meaning to the phrase "if a party has peculiarly within his power to produce witnesses whose testimony would elucidate the transaction".

Pursuant to the rationale set forth by the Court of Special Appeals, the mere fact that a potential witnesses' physical location is known to a party, for however brief a time, at any moment prior to, or during the course of a trial, the witness is "equally available" to the parties *per se*, and the "missing

witness instruction", would not be applicable.

The record clearly indicates that the said witness, Stella Kwong, was made unavailable to the Defendant and his counsel in their presentation of a defense in this matter, as she was removed and hidden under the Federal Witness Protection Act. The whereabouts of the witness was so kept from the Defendant and his counsel until the day of trial. The discovery and inspection answer listed the address in care of the State's Attorneys Office. On the trial day, counsel was informed that the witness was in the State's Attorneys Office and would not in any manner talk to the Defendants' counsel as the witness had on a prior occasion advised counsel from the State's Attorneys telephone that she would not talk to counsel.

The situation confronting defense counsel is such: The State had indicated numerous times on and off the record that they intend to call this witness, this witness made numerous statements to the State, which the Staate refused to disclose to defense counsel despite numerous proper requests, this witness is named in the indictment as a target of the alleged violence, this witness had been under the complete control and influence of government representatives by her participation in the Witness Protection Act, and this witness has steadfastly refused to talk to defense counsel in any manner.

In light of these facts, the State asserts that since defense counsel "could" have issued a summons to compel her to appear as a defense witness on the day of the trial, and then put her on the stand before a jury to find out from her for the first time her recollection of the facts.

If the Court of Special Appeals decision is allowed to stand with that rationale, when defense attorneys find themselves in similar situations, they may be compelled to call the obvious apparent adverse witnesses before a jury for a fishing expedition. It is the opinion of this counsel that such an action would be dangerous, irresponsible and possible grounds for post conviction relief.

Where the State has so much information, cooperation and



control over a witness upon which to base a decision whether or not to call her, while defense attorney has so little, it cannot be consistent with justice and is violation of due process of law for a Court to declare the witness "equally available" to both sides and is not "particularly within the control of one party".

In briefly addressing the issue whether or not Stella Kwong's testimony would "elucidate the transaction", the record clearly indicates that she was present at the scene, had numerous conversations with the various interested parties, was the alleged target of violence and was considered by government authorities material and important enough as a witness to merit participation in the Federal Witness Protection Act.

The Court of Special Appeals unsubstantiated assertion that Stella's testimony "would have been at most heresay" is an assertion that is just inconsistent with the facts presented in this case.

## CONCLUSION

For the reasons stated above, Petitioners respectfully submit that their Petition for a Writ Certiorari to the Maryland Court of Appeals should be granted.

Respectfully submitted,

BARRY H. HELFAND

Attorney for Petitioners
23 West Middle Lane
Rockville, Maryland 20850
(301( 424-0115

BING FA YUEN and
SHUI PING WU

v.

STATE OF MARYLAND

In the
Court of Appeals
of Maryland

Petition Docket No. 225
September Term, 1979
(No. 1317, September Term, 1978
Court of Special Appeals)

# ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
*Chief Judge*

Date: September 10, 1979.

7-15-79

# BING FA YUEN AND SHUI PING WU *v.* STATE OF MARYLAND

[No. 1317, September Term, 1978.]

*Decided July 12, 1979.*

CRIMINAL LAW — INSTRUCTIONS TO JURY — *Missing Witness Rule — Presumptions — That Testimony Would Be Unfavorable — Rule's Operation Precludes Witnesses Whose Production Is Not Peculiarly Within Power Of Party Against Whom Inference May Be Drawn — No Presumption Or Inference When Witness Is Available To Both Sides — Where, As Here, Witness Was Available To Defense By Subpoena, Failure To Subpoena Grounded Upon Theory That State Indicated It Would So Call, And Did Not, Held Without Merit — Trial Court Cannot Instruct Jury In Matter Relating To Missing Witness That It Must Presume Unfavorable Testimony Upon Absence Of Witness, Conversely, Since Instruction Is Merely Advisory It Is Proper That Instruction Be That Jury May So Infer — Generally, In Absence Of Instruction, Jury Is Not Prohibited From Inferring Impact Of Missing Witness So That Even If There Were Failure To Grant An Affirmative Instruction It Does Not Remove Availability Of The Inference — Whatever Prejudice May Usually Arise From Failure To Give Such Advisory Instruction Is Diminished Because Inferential Though Process Is Still Available — No Error Conceived In Trial Court's Refusal To Give Missing Witness Instruction.* pp. 112-114

CRIMINAL LAW — DISCOVERY — EVIDENCE — *Attempt At Judicial Discovery — To Have Post Trial Court Inspection Of Prosecutor's File — To Obtain Investigative Notes, Statements And Reports As Discoverable Evidence — Holding In Carr v. State By Maryland Court Of Appeals Did Not Extend Criminal Discovery Or "Brady" Demands (Brady v. Maryland) To Fishing Expedition Or Require Prosecutorial Open Files But Rather It Appears To Be Synonymous With Specific Discovery Limitations As Explicated In United States v. Agurs — No "Brady" Violation Found, More Especially With Relation To Statements Of Non-Witnesses.* pp. 114, 116

CRIMINAL LAW — TRIALS — *Closing Argument Of Counsel — Right To Read To Jury Quotations From Transcript Supplied Daily By Court Reporter — Discretion Of Court — Not To Be Exercised Arbitrarily — Generally, Some Accompanying Explanation For Use By Counsel Of Transcript Should Be Proffered For Trial Judge To Make Intelligent And Proper Judgment On Validity Of Request — Since Closing Arguments Were Not Transcribed Court Was Unable To Determine Effect Trial Court's Denial Might Have Had*

*— No Contextually Inferable Harm Evident Even If Proffer Had Indicated An Erroneous Denial.* pp. 117-119

H. E. F.

Appeal from the Circuit Court for Montgomery County (MILLER, J.).

Bing Fa Yuen and Shui Ping Wu were convicted by a jury of extortion and from judgments entered thereon, they appeal.

Judgment affirmed. Costs to be paid by appellants.

The cause was argued before MOORE, LOWE and MACDANIEL, JJ.

*Barry H. Helfand* for appellants.

*Deborah K. Handel, Assistant Attorney General,* with whom were *Stephen H. Sachs, Attorney General, Andrew L. Sonner, State's Attorney for Montgomery County,* and *Irma S. Raker, Assistant State's Attorney for Montgomery County,* on the brief, for appellee.

LOWE, J., delivered the opinion of the Court.

Bing Fa Yuen and Shui Ping Wu were convicted by a jury in the Circuit Court for Montgomery County of extortion, *i.e.,* violating Md. Ann. Code art. 27, § 562. The indictments charged that they

> "did verbally threaten Raymond NMN Lee to do injury to the person and property of Raymond Lee and Kam Chu Kwong with a view to extort . . . ."

The initial contention of error, thought by appellants to have been committed at the trial, was the judge's refusal to grant a "missing witness" instruction because Kam Chu Kwong (referred to as Stella Kwong) was never produced by the State to testify; however, appellants' contentions are founded upon insubstantial support.

They begin by stating that:

> "The witness, Kwong, was named as a victim in the indictment."



As can be seen above, that is simply not correct. The *victim* of the crime was Raymond Lee, he who was threatened with a view to extort. Stella Kwong was never threatened with a view to extort although she was one of the subjects of threat and injury intended to coerce payment from Raymond Lee.

More significantly to the issue here, appellants next contend that:

> "She [Stella Kwong] was not accessible to counsel for two reasons: (1) She was in [under] the Federal Witness Protection Act, and (2) She refused to talk to counsel."

Apropos of the prerequisite to a right to a missing witness instruction, appellants conclude that

> "[t]he witness, almost a party, was therefore: (1) particularly available to the State, (2) her testimony concerned the basic issue in controversy, and (3) it would be natural for the party (State) to have called said witness in presenting its case. *Brooks v. Daley,* 242 Md. 185."

Preliminarily, we note that the record does not indicate, nor do appellants suggest, that Stella Kwong was ever directly threatened or "extorted." Her testimony would have at most been hearsay, repeating threats which Lee had told her were made to him. She was not, therefore, "almost a party," nor would her testimony concern "the basic issue in controversy" other than in a tangential and perhaps inadmissible fashion.

More significant from a legal view are appellants' contentions, based upon *Brooks v. Daley,* that Stella Kwong was "particularly available to the State" and that "it would be natural for the party (State) to have called" her. That is presumably an application of the rule appropriate to civil cases, but until *Christensen v. State,* 21 Md. App. 428 (1974), Maryland had never recognized the application of the rule to criminal cases.

Since our opinion in *Christensen* acknowledging the viability of the missing witness rule in criminal cases in Maryland, we have been deluged with every conceivable twist

invoking application of that permissible inference, notwithstanding the Court of Appeals' reversal of our opinion in that case upon its facts. *Christensen v. State,* 274 Md. 133 (1975). *See Pierce v. State,* 34 Md. App. 654, 658-659 (1977), *cert. denied,* U. S. , 98 S. Ct. 307 (1977). In our *Christensen,* we definitionally relied upon the hoary Supreme Court case of *Graves v. United States,* 150 U. S. 118 (1893):

> " 'The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' *Graves v. United States,* 150 U. S. 118, 121." *Christensen v. State,* 21 Md. App. at 430.

The definition precludes from the rule's operation those witnesses whose production is not "peculiarly" within the power of the party against whom the inference may be drawn. *Graves v. United States,* 150 U. S. at 121. There is no such presumption or inference where the witness is available to both sides. *Christensen v. State,* 274 Md. at 134. Although Stella Kwong refused to speak with appellants' attorney before trial, appellants admitted at argument that they were aware of her availability through the State's Attorney's office. They did not choose to subpoena her presumably relying upon the fact that the State had indicated that she would be a witness. But Stella *was* available to them by subpoena and they cannot excuse their failure to subpoena her by claiming to have relied on the State's indication that she would be called. She was, therefore, "equally available" and so presumed unless appellants showed the court below that they had exhausted the avenues available to them to produce her. *See Christensen v. State,* 274 Md. 133.

Appellants added a final innovative twist to their requested instruction. They included the admonition to the jury that they should decide whether the rule should apply in this case at all.

"I would ask the Court to instruct the jury that



> evidence has been presented in this trial which indicates that a valuable witness who has knowledge of the facts in issue in this case was not called to testify. You are instructed that if either the State or the Defendant failed to call such a presumption rises that his testimony would have been unfavorable to the party who did not call him. It is up to you to decide which party should have naturally called this witness. This rule does not apply where the testimony of an uncalled witness is purely cumulative and the witness is not in a better position to know the facts than those witnesses who were called, nor does the rule apply where the reasons for not calling the witness are reasonable and proper."

Initially, we note that the request was not directed specifically to the absence of Stella Kwong, it was a general statement, presumably, that the jury might apply the rule willy-nilly. Secondly, what is referred to as a presumption, here and in some of the cases, is really a permissible inference. The court cannot instruct a jury that it *must* presume unfavorable testimony upon the absence of a witness. The instruction — the *advisory* instruction in Maryland — is that the jury *may* infer. *See United States v. Stulga,* 584 F. 2d 142, 145 n. 1 (1978). The instruction becomes merely a highlighting of a significant void in a party's case; but even in the absence of an instruction, the jury is not precluded from so inferring. Inferences of all types are always available to the factfinders.[1]

The failure to grant an affirmative instruction does not remove the availability of the inference. As a consequence, whatever prejudice may usually come from not giving an advisory instruction is diminished, because the inferential

1. On the contrary, however, if a party proffers sufficient evidence to the court indicating unavailability of a witness otherwise "peculiarly" within its power to produce, an instruction must be given that "no inference should be drawn by the failure . . . to call [that person] as a witness." Christensen v. State, 274 Md. at 141. The failure of a trial judge to grant the requested instruction is prejudicial error. *Id.* That case provides guidance for the granting of a preclusory instruction; however, we are concerned here with when a defendant will be prejudiced by a refusal to give a highlighting instruction stating that the inference is available.

thought process is still available. The prejudice is simply that such an inference is not given preferred instructional attention over any other inferences available from the testimony or absence of testimony.

Possibly for that reason, judges hesitate to grant the missing witness instruction; they do not wish to emphasize one legitimate inference over all others which the jurors have been told are solely within their judgment. It is also for that reason that the right to a missing witness instruction is circumscribed with the limitations, inter alia, that the testimony or evidence must be material, noncumulative and the witness "peculiarly" available. The judge must find all of these criteria applicable before he highlights the absence of the witness. In most instances, emphasis of one possible inference out of all the rest by a trial judge can be devastatingly influential upon a jury although unintentionally so. We see no error in the case before us.

The second question asked by appellants is:

> "Did the Trial Court commit reversible error by refusing to inspect the State's Attorney's file plus police reports and investigative notes, not only after proper motion but after a prior promise to do so?"

The question asks too much. Appellants are neither entitled to such judicial discovery, nor did the court promise it.

Prior to and during trial, appellants sought discovery of *statements* made by witnesses or potential witnesses. Apparently with the possible exception of a statement of Stella Kwong, the specific material requested was given to appellants before the end of the trial.

Relying primarily on *Brady v. Maryland,* 373 U. S. 83 (1963), appellants contend that it was error for the trial court to refuse to examine, post-trial, the entire file of the State's Attorney, the police reports and investigative reports for discoverable evidence.

The issue took shape during the examination of the witness Hang Sang Leong. According to appellants' brief:

> "After direct but before cross-examination, defense



> counsel asked the Court *to compel the State to produce any statement made by this witness* so that counsel could cross-examine and determine if there was any exculpatory information or if there was any inconsistency of statements. The State was under a duty to supply counsel with *Brady v. Maryland* information. Counsel again pointed out that later in the trial the State was going to call her and Kwong and further that counsel wished to see *their respective statements.* [emphasis added].

To this, the court replied at T. 202: [2]

> THE COURT: Well, it is up to you. As I said before, I am not going to get into a position of ordering the State to produce *statements.* But if the trial results in a conviction I will examine those *statements* in camera. If there are inconsistent statements in them I will declare a mistrial." (emphasis added).

However, appellants' very next sentence concedes that:

> "At T. 203, the copies were supplied and a Detective Stone's notes were supplied."

It is apparent then that appellants have no complaint as to the requested statement of Leong.

They go on to complain that when Raymond Lee was called, their request for Lee's statement was initially denied, but was, presumably, voluntarily turned over on the next day of trial. According to appellants, however,

> "[t]he statement was given too late to benefit counsel."

Yet appellants made no effort to obtain a continuance or to recall the witness.

The thrust of appellants' contention seems to be that the judge violated a promise to investigate, post-trial, all of the

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2. Reference to the transcript of the trial proceedings.

State's files and notes. That is simply not so. The judge promised to examine "statements" in camera, meaning those statements requested at the time, *i.e.,* Hang Sang Leong's, Raymond Lee's and Stella Kwong's. Appellants received two of these statements and predicated their demand for the other upon Stella being called as a witness.[3] In short, the judge complied with that which he promised.

Beyond that, appellants really received more than that to which they were entitled. Relying on *Brady,* they are in reality trying to invoke (or exceed) a *Jencks*[4] discovery rule for Maryland, something we have expressly declined in the past. *Carr v. State,* 39 Md. App. 478, 481-482 (1978). Although the Court of Appeals' reversal of our *Carr* in 284 Md. 455 (1979), carried us somewhat closer to Jencks than we had formerly thought, the Court of Appeals did not extend criminal discovery or *Brady* demands to "fishing expeditions" or require prosecutorial open files. *Id.* at 470-472. The extent of disclosure by the Court of Appeals seemed to hold with the *United States v. Agurs,* 427 U. S. 97 (1976), that disclosure is only required in three situations: 1) where the undisclosed evidence includes perjured testimony, knowledge of which is charged to the prosecution; 2) specific evidence, strictly material that might have affected the outcome of the case; 3) "The Court rejected a standard of requiring disclosure of 'everything that might influence a jury' because 'the only way a prosecutor could [then] discharge his duty would be to allow complete discovery of his files as a matter of routine practice.' " *Carr v. State,* 284 Md. at 464-465. That certainly lays to rest the broad demand allegation expressed in appellants' question.

As to the statement of Stella Kwong, appellants strain mightily to fall under the *Brady* umbrella, but the absurdity of considering this as a *Brady* issue is self-evident. The

3. "MR. HELFAND [defense counsel]: Yes, if the police department had taken a statement from this witness and, particularly, Mr. Lee and Stella later will be called, and who have refused to talk to me, and have been under government protection, and I am entitled to see that statement before I even attempt to cross examine.
I can't see how that could hurt."

4. Jencks v. United States, 353 U. S. 657 (1957).



appellants have not alluded to any evidence or testimony that was 1) material, 2) demonstrably favorable, or 3) that was not already known to them — three more essential prerequisites to the successful invocation of the *Brady* doctrine. *Moore v. Illinois,* 408 U. S. 786 (1972); *Younie v. State,* 19 Md. App. 439 (1973). Even under discovery rules it would fall within the discretionary category, *see Kardy v. Shook, J.,* 237 Md. 524, 540-541 (1965) (citing *Whittle v. Munshower,* 221 Md. 258, 261 (1959), although new Md. Rule 741 liberalized its predecessor (Md. Rule 728).

> "It does not, however, make specifically available to defense counsel any statements made by witnesses." *Carr v. State,* 284 Md. at 470-471.

Clearly then, it does not make available statements of non-witnesses. There was no promise. There was no *Brady* violation. There was no error.

The third issue gives us considerably more procedural concern.

> "Did the Trial Court commit reversible error in refusing to allow defense counsel the opportunity to read to the jury accurate quotations from the transcript which had been prepared by the court reporter and supplied to counsel with daily copy?"

Because appellants did not have the closing argument transcribed for the record, we are unable to determine what, if any, effect this denial may have had. *Blizzard v. State,* 30 Md. App. 156, 169-170 (1976), *rev'd on other grounds,* 278 Md. 556 (1976); Md. Rule 1224 d 1; *see also White v. State,* 8 Md. App. 51, 54 (1969). That a request was generally denied is clear from what was transcribed for the record, however. *Cf. Sergeant Co. v. Pickett,* 283 Md. 284 (1978).

Actually the issue was fomented by and the request denied first to the State's Attorney. Inferentially, appellants joined the request but along with the State, fell in the general denial.

> "MS. RAKER: [prosecuting attorney]: I have one last question with respect to argument before the jury.

We all know the jury's recollection controls and that they are the judges solely of the law and the facts. I would indicate to the Court that both Mr. Helfand and I have during the course of the trial ordered testimony of certain of the witnesses. It is my understanding that it is inappropriate to read from a transcript indicating that that is the official record, or that —

THE COURT: Yes, I do not permit that.

MR. HELFAND: Even with a comment that it is their recollection, but we have had it typed and it is —

THE COURT: I'm not going to permit you to read the transcript of the proceedings. You can take exception to that if you wish.

MR. HELFAND: I would like to now and not have to do it later.

THE COURT: All right.

(Whereupon, jury enters the courtroom.)"

Our concern is the jealousy with which we attempt to safeguard a broad right of argument to counsel. *See Wilhelm v. State,* 272 Md. 404 (1974). We agree with the State's well researched conclusion that most courts regard the propriety of reading portions of the transcript as resting within the sound discretion of the trial court. In light of the discretionary right for a court to read excerpts to the jury itself, Md. Rule 758 c; *Veney v. State,* 251 Md. 159, 172-173 (1968), it follows that such discretion to read may be delegated to counsel. Maryland obviously is in line with the courts regarding the right to read as a discretionary one. That discretion, however, must not be exercised arbitrarily so as to automatically preclude even a consideration of reading excerpts from the transcript.

For us to determine whether the stilted refusal here was an abuse, there should be some further proffer to indicate to the court that which is to be read, the purpose for the request and the need as seen by the party making the request. Just



as discretion should not be arbitrarily withheld, it can not be unexplainedly demanded. We have indicated in the past that despite our general anxiety in providing breadth of argument,

> "trial judges should be vigilant gently to excise blatantly irrelevant attempts by counsel to beguile jurors." *Pierce v. State,* 34 Md. App. 654, 670 (1977).

Without some explanation accompanying the request, a trial judge can make no judgment on the validity of the use of reading from a transcript. Care must be used in permitting out of context reading of what purports to be an official record of what was said, but that concern may be alleviated by an appropriate instructional admonition.

Furthermore, as we have noted, without such proffer and without the context of the argument in which to view the discretionary withholding, we are unable to determine what harm may have been done by declining the request. For discretion to be abused, it must be harmful in the context of its exercise. *Worthen v. State,* 42 Md. App. 20 (1979). There is no contextually inferable harm indicated here even if a proffer had indicated an erroneous denial. If there had been error it was obviously harmless. *Dorsey v. State,* 276 Md. 638 (1976).

The final issue we will mention has no merit at all.

> "Did the Trial Court commit reversible error by denying the appellants' prohibitive preliminary motion in limine?"

Appellants have waived this issue by failing to object as the testimony which they sought to preclude came in during the trial of the case. *Sutton v. State,* 25 Md. App. 309, 316 (1975). "[T]here is substantial authority for the proposition that the denial of a motion *in limine* cannot in and of itself constitute reversible error." *Ory v. Libersky,* 40 Md. App. 151, 164 (1978). We will not deviate from that position in the present case.

*Judgments affirmed.*
*Costs to be paid by appellants.*